No. 82-1600

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM GIBBONS, TRUSTEE OF THE PROPERTY OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, PETITIONER

v.

NATIONAL STEEL SERVICE CENTER, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether federal transportation law preempts a state tort rule of strict liability for interstate rail carriers hauling hazardous substances.

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This brief is submitted in response to the Court's order of May 16, 1983, inviting the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A18-A21) is reported at 693 F.2d 817. The opinion of the Supreme Court of Iowa on certification of a question of state law (Pet. App. A7-A17) is reported at 319 N.W.2d 269. The opinion of the district court (Pet. App. A1-A5) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1982. A petition for a rehearing was denied on December 28, 1982. The petition for a writ of certiorari was filed on March 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the Constitution of the United States provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the Supreme Law of the Land * * *.

The Federal Railroad Safety Act of 1970, 45 U.S.C. 434, provides:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

The Hazardous Materials Transportation Act, 49 U.S.C. 1811 provides:

> (a) Except as provided in subsection (b) of this section, any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted.
>
> (b) Any requirement, of a State or political subdivision thereof, which is not consistent with any requirement set forth in this chapter, or in a regulation issued

under this chapter, is not preempted if, upon the application of an appropriate State agency, the Secretary determines, in accordance with procedures to be prescribed by regulation, that such requirement (1) affords an equal or greater level of protection to the public than is afforded by the requirements of this chapter or of regulations issued under this chapter and (2) does not unreasonably burden commerce. Such requirement shall not be preempted to the extent specified in such determination by the Secretary for so long as such State or political subdivision thereof continues to administer and enforce effectively such requirement.

STATEMENT

Respondent brought this action against the bankruptcy trustee of the Chicago, Rock Island and Pacific Railroad Company for damages resulting from a train accident that occurred on September 1, 1975. On that date, a train operated by the Railroad and loaded with propane gas derailed and exploded, damaging respondent's warehouse.

The district court directed a verdict for petitioner on respondent's negligence theory, and the jury found for petitioner on the issue of res ipsa loquitur. The district court thereafter granted respondent's motion for a directed verdict on a theory of strict liability. In a special interrogatory the jury had found respondent's damages to be $443,623. Judgment was entered accordingly.

On appeal, the Eighth Circuit certified to the Iowa Supreme Court the question whether strict liability for abnormally dangerous activities applies to common carriers (which are required by law to carry abnormally dangerous cargo).[1] On May 19, 1982 that court (en banc) held that

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[1] See 49 U.S.C. (Supp. V) 11101(a); *Akron, Canton and Youngstown R.R.* v. *ICC*, 611 F.2d 1162 (6th Cir. 1979), cert. denied, 449 U.S. 830 (1980).

there should not be a common carrier exception to the doctrine of strict liability for abnormally dangerous activities. It reasoned (Pet. App. A14-A15):

> Here we have two parties without fault. One of them, the carrier, engaged in an abnormally dangerous activity under compulsion of public duty. The other, who was injured, was wholly innocent. The carrier was part of the dangerous enterprise, and the victim was not. The carrier was in a better position to investigate and identify the cause of the accident. When an accident destroys the evidence of causation, it is fairer for the carrier to bear the cost of that fortuity. Apart from the risk distribution concept, the carrier is also in a better position than the ordinary victim to evaluate and guard against the risk financially.
>
> Furthermore, the carrier is in a superior position to develop safety technology to prevent such accidents, and assessment of accident costs is one means of inducing such developments * * *.

Relying on *Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), the Eighth Circuit then determined that federal transportation law did not preempt Iowa's authority to impose strict liability on common carriers. Accepting the Iowa Supreme Court's statement of Iowa law as binding on it, the court of appeals affirmed the judgment of the district court.

DISCUSSION

The court of appeals' conclusion—that federal transportation law does not preempt Iowa's common law power to impose liability without fault on the trustee of an interstate rail carrier—is correct and does not conflict with any decision of this Court or any court of appeals. Further review is unwarranted.

1. "[T]he Supremacy Clause invalidates states laws that 'interfere with or are contrary to, the laws of Congress . . . . ' *Gibbons* v. *Ogden*, 9 Wheat. 1, 211 (1824)." *Chicago & North Western Transportation Co.* v. *Kalo Brick and Tile Co.*, *supra*, 450 U.S. at 317. Congressional intent to preempt may be express or implied. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). Even when state law is not completely displaced, it may be preempted to the extent of actual conflict with federal laws, *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or when it interferes with "the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941) (footnote omitted). A state tort action for damages is also preempted when it interferes with a federal regulatory scheme, even if the federal agency has declined to exercise its jurisdiction. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 246-247 (1959).

The federal statutes pertaining to railroad safety and the transportation of hazardous materials—the Federal Railroad Safety Act of 1970 ("FRSA"), 45 U.S.C. 421 *et seq.*, and the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. 1801 *et seq.*—do not preempt the state common law rule at issue here. The primary purposes of these acts are to establish uniform standards for safe rail operations, to assure the safe transportation of hazardous materials in commerce, and to provide civil and criminal penalties and other enforcement tools to encourage compliance. But the penalties contemplated by the FRSA and the HMTA are not designed to compensate victims of rail accidents, and neither statute purports to address the remedies available to those victims.[2]

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[2]We note that in other rail safety legislation where Congress has chosen to address the question of liability for personal injuries it has done so expressly. See, *e.g.*, the Federal Employers' Liability Act, 45 U.S.C. 51-60.

The Department of Transportation regulations, 49 C.F.R. Parts 171-179, 213, 215-225, likewise address the manner in which hazardous materials are transported, but not the standard of tort liability for damages arising out of their carriage. Thus the effectiveness of the Department's regulations is not hampered by Iowa's choice not to recognize a common carrier exception to the rule of strict liability for ultrahazardous activities.

That Congress did not intend to preempt state rules in the absence of federal action on the standard of tort liability is clear from the language of the statutes' preemption provisions. The FRSA expressly permits a state to "adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. 434; H.R. Rep. No. 91-1194, 91st Cong., 2d Sess. 19 (1970). Similarly, under the HMTA, only a requirement "which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted." 49 U.S.C. 1811(a).

The state rule here fixes the standard of tort liability applicable to the common carriage of hazardous materials. The Secretary of Transportation has not issued any regulations on this subject under either the FRSA or the HMTA. Since neither the statutes nor the regulations address this issue, the state rule is permitted to stand. See *Southern Pacific Transportation Co.* v. *United States*, 462 F. Supp. 1193, 1223-1226 (E.D. Cal. 1978) (federal regulation of interstate railroad transportation of hazardous materials not so pervasive as to preempt state law governing contributory or comparative negligence standard). Cf. *Rucker* v. *Norfolk & W. Ry.*, 64 Ill. App. 3d 770, 777-778, 381 N.E. 2d 715, 722 (App. Ct. 1978), rev'd on other grounds, 77 Ill. 2d 434, 396 N.E. 2d 534 (S. Ct. 1979).

2. Petitioner erroneously asserts that the court of appeals' decision conflicts with the decision of the Tenth Circuit in *Silkwood* v. *Kerr-McGee Corp.*, 667 F.2d 908 (10th Cir. 1981), juris. postponed, No. 81-2159 (Jan. 10, 1983). The Tenth Circuit held in *Silkwood* that a state could apply a strict liability standard in a tort action for nuclear-related property damage, despite the pervasive federal regulation of the nuclear industry and Kerr-McGee's substantial compliance with federal requirements. 667 F.2d at 920-921.

Petitioner apparently relies on *Silkwood's* additional holding that the federal statutory and regulatory scheme in nuclear energy matters prevents a state from awarding punitive damages under state law for torts committed by federal licensees. See 667 F.2d at 921-923. But the federal government regulates the processing and handling of plutonium to a far greater extent than it does other hazardous materials. See 81-2159 Br. for the U.S. as Amicus Curiae 13-23.[3] As this Court noted in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, No. 81-1945 (Apr. 20, 1983), slip op. 19, "the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." And the Atomic Energy Act makes clear that states may not regulate nuclear plants "for purposes [of] protection against radiation hazards" (42 U.S.C. 2021(k)). Since punitive damages do not compensate victims for damages suffered, they can only be understood as a means of inducing licensees to protect against future accidents. The award of such damages is thus inconsistent with the regulatory system—enforced by criminal and civil penalties—created by the Atomic Energy Act. 42 U.S.C. (& Supp. V) 2271-2284.

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[3]We have provided counsel for petitioner and respondent with copies of our brief in that case.

This case, by contrast, involves no punitive damages and concerns statutes entirely distinct from the Atomic Energy Act. Both the FRSA and HMTA contemplate state regulation until the Secretary acts with respect to the particular subject matter. There is accordingly, no conflict with the Tenth Circuit's decision in *Silkwood*.

3. Petitioner has also suggested (Pet. 15; see Pet. App. A2-A4) that preemption is appropriate here because the Interstate Commerce Act imposes an obligation on rail carriers to transport hazardous substances. See note 1, *supra*. But any burden that strict liability might place on a rail carrier's fulfillment of its common carrier responsibilities under the Interstate Commerce Act can be reflected in the carrier's rates for the transportation of hazardous substances. Iowa's standard of strict liability thus does not impede federal rail policy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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